Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-1398

CHARLES J. WOLFER and Wife,
KATHRYN WOLFER,
Petitioners

v.

RAYMOND C. THALER and the
CITY OF BRENHAM,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, CHARLES J. WOLFER AND KATHRYN WOLFER, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit rendered in these proceedings on January 7, 1976.

OPINION BELOW

The Court of Appeals opinion was a signed, published opinion, see 525 F.2d 977. A copy of the same is set out in the Appendix, infra, page 15.

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JURISDICTION

The opinion of the Court of Appeals was handed down on January 7, 1976. The jurisdiction of this Court is invoked under 42 U.S.C. 1983 and 28 U.S.C. 2201, as well as the 14th Amendment of the Constitution of the United States.

QUESTIONS PRESENTED

(1) Does the statutory authorization to kill, abridge or deny the right to life as guaranteed by the 14th Amendment to the Constitution of the United States?[1]

(2) Is declaratory relief appropriate?

(3) Should the City of Brenham have been dismissed as a party Defendant under *Kenosha v. Bruno,* 412 U.S. 507 (1973)?

(4) Was Respondent Thaler rightfully held to be not liable to Petitioners in money damages in view of the absolute liability assigned to "every person" under 42 U.S.C. 1983?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution provides in pertinent part:

> . . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . . .

STATUTORY PROVISIONS INVOLVED

Title 28, United States Code, Section 2201, Provides:

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1. "No State shall . . . deprive any person of life, liberty, or property without due process of law. . . ."

> "In a case of actual controversy within its jurisdiction, except with respect to Federal taxes, any court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declarations shall have the force and effect of a final judgment or decree and shall be reviewable as such."

Title 42, United States Code, Section 1983, provides:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Petitioners are the parents of Charles Edward Wolfer, who, at the time of his death was a third-year student at Texas A & M University at College Station, Texas. As Plaintiffs, they brought this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201, seeking damages and declaratory relief arising from the death of their said son resulting from gunshot wounds inflicted by the Respondent, Raymond C. Thaler, then acting as a police officer for the City of Brenham, Texas.

On January 22, 1971, the said Wolfer and one Ross Wayne Jahren, a student at Blinn College in Brenham, Texas, were allegedly engaged in burglarizing the Gibson Discount Store in Brenham. Shortly after midnight, Officer

Thaler received a call that the burglary was in progress, and he and another officer went to the scene, where he stationed himself at the rear door while the other officer entered the front door to make the arrest. Although Jahren submitted passively to the arresting officer, Wolfer ran out the back door of the store. Thaler allegedly called to him to stop, and then fired one blast from his sawed-off shotgun at him, hitting him in the back and killing him at the scene. Neither Wolfer nor Jahren were armed, and neither had threatened or used force against the arresting officers.

Respondents do not dispute that Wolfer had had *no criminal record whatever* (R. 28) nor that, upon his plea of guilty, Jahren received a *probated* sentence of five years for the burglary charged against him arising out of the events herein described. (R. 28). *None,* in fact, of the facts alleged in Plaintiffs' Complaint were disputed; the only issues before the Court are those of law (R. 40, 41).

Upon motion, the trial judge reconsidered its earlier decision and, in view of *Kenosha v. Bruno,* 412 U.S. 507 (1973), dismissed Petitioners' Complaint against the City of Brenham (R. 35).

While this case was pending in the District Court, the Texas Legislature enacted a new Penal Code which became effective on January 1, 1974. Contrary to the District Court, Petitioners do *not* believe that the justifiable homicide provisions of the old Article 1222 were "substantially" modified by the new Sections 9.42 and 9.43 of the Texas Penal Code.

Art. 1222 said in pertinent part:

> "Homicide is justifiable when inflicted for the purpose of preventing. . . burglary and theft at night. . .

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whether the homicide be committed by the party about to be injured or by another in his behalf . . . at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building. . ."

Petitioners state that it is self-evident that given the same set of circumstances as in the subject case, the same senseless killing would result under the new sections, which read as follows:

Section 9.42 in relevant part:

". . . A person is justified in using deadly force against another to protect land or tangible, movable property . . . when and to the degree he reasonably believes the deadly force is immediately necessary: (A) to prevent the other's imminent commission of . . . burglary . . . or (B) to prevent the other who is fleeing immediately after commiting burglary . . . from escaping with the property; and (3) he reasonably believes that: (A) the land or property cannot be protected or recovered by any other means; or (B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury."

Section 9:43 in relevant part:

"A person is justified in using force or deadly force against another to protect land or tangible, movable property of a third person if, under the circumstances as he reasonably believes them to be, the actor would be justified under Section 9.41 or 9.42 of the code in using force or deadly force to protect his land or property and: (1) the actor reasonably

believes that the unlawful interference constitutes attempted or consummated theft of or criminal mischief to the tangible, movable property. . ."

REASONS FOR GRANTING THE WRIT

(1) Petitioners claim that, despite the semantic difference between the old Article 1222 and the new Sections 9.42 and 9.43, *the operational effect is identical,* is not mere rhetoric; it is obvious after the most cursory analysis. Under both statutory formulations, the officer (or *any* citizen, for that matter) is authorized to kill a person suspected of having committed a burglary *without regard* to whether the suspected offender is armed, or whether he threatened or used force against the arresting (or, more precisely, the *killing*) officer, or whether the officer was in reasonable fear of his life or serious bodily injury, or even whether the deadly force to be used would probably be hazardous to others in the vicinity. Viewed another way, the only limitations upon the right to kill in the old statute were:

(a) the *suspected* burglary had to be at night;

(b) the *suspected* offender had to be in the building or at the place where the theft was committed, or within reach of gunshot from such place or building.

Under Article 1222, a person was not required to resort to other means or to retreat before killing to prevent burglary or any one of the enumerated felonies. *Williams v. State,* 4 S.W. 64 (Tex. Ct. App., 1886); *Foster v. State,* 11 Tex. Ct. App. 105 (1881). Moreover, when Article 1222 justified the use of deadly force, the *degree* of deadly force used was immaterial. *Vasquez v. State,* 371 S.W.2d 389 (1963); *Mayhew v. State,* 144 S.W. 229, 230 (1912).

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But the new Code *continues* the same sanguinary, excessive invitation to lawful violence. One may still justifiably kill the nighttime thief running away with the watermelon. Under the new Sections 9.42 and 9.43, *not the slightest duty* is imposed to make the most superficial investigation to verify the actuality of a burglary before the killing is authorized. Nor need a warning to desist or to surrender be made. Death may be inflicted by either Section without the *least* requirement of self-defense or the defense of another — but rather, for the protection or recovery of *property*, regardless of its value. No limitation is imposed on the killing *in terms of the danger to others* before deadly force is authorized. In sum, although the verbal formulation is different, the manner in which the statutes, old or new, are brought into operation is *absolutely* the same. Consider the affidavit of Officer Thaler (R. 46):

> ". . . As I was at the back door of the store, a subject ran out of the back door, wearing a white store apron over his face. I yelled at him several times to stop,[2] but he kept running away from the store. I fired one shot from a shot gun and the subject fell to the ground . . . I was in a police uniform and he could hear me order him to stop. It was the only way I could stop the burglar. . ."

By such statements, the officer suggests quite clearly that the life of the suspected burglar is of meager value—or possibly inconsequential—compared to the goal of protecting or recovering whatever property, *if any*, that may

2. This is somewhat contradicted by Wolfer's co-burglar, Jahren, who stated in his deposition (R. 17, 4), "I only heard a warning, "stop!" from the police officers, no other conversations. He was outside, I was inside."

have been taken in the suspected burglary. Moreover, the officer was under no legal compulsion, no statutory limitation, to consider whether a warning shot might not have stopped the fleeing suspect without killing him, or whether a less lethal weapon (a shotgun is probably the most destructive hand weapon next to a machinegun) might not have stopped the suspect by a less-than-mortal wound, or even the actual dangers to *others* resulting from the wide dispersal of pellets from a shotgun blast.

The point missed by the trial judge is that the officer's conduct was authorized by *either* the old Article 1222 or by the new Sections 9.42 and 9.43. Not to belabor the point, but *the operational effect of both statutes is the same*.[3] Conflict between the rights of property and the right to life is perhaps nowhere more stark and direct than in this case. If the Courts uphold the State's right to inflict death under claim of protecting or recovering property, then the government indeed provides a sanguinary example of respect for human life to its citizenry and to the world. An enlightened Penal Code, complying with the demands of the federal constitution and developing notions of humane justice, would surely require more stringent limitations on the right to kill before permitting agents of the State to commit, with legal sanction, the ultimate, final, and permanent deprivation — that of life itself. To the petitioners, the ultimate question posed by this case is, does the right to life *really* occupy a higher preferred position in our legal value system than the rights of property?

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3. It is interesting to note that the Model Penal Code is similar to the Texas statute, excepting that deadly force is *not* allowed merely to recover property without the threat or use of deadly force by the property-taker. *Model Penal Code*, Final Draft (1962), § 3.06, 3.07.

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It should be quite explicit that petitioners are *not* arguing that a police officer does not have the right to defend himself when he reasonably feels that his life (or the lives of others) is endangered. Human nature being what it is, the right of self-defense is probably inherent in the chromosomes of every legal system on earth. What petitioners are striving for is *to impose some reasonable limitations on the right to kill* in the defense of *property,* quite apart from the situation of protecting one from personal injury or death.

It is ironic to realize that, although the taking of property was never a capital offense, these statutes authorize the police to kill for a crime which would never be so punished by any system of law.

(2) Holding that Respondent Thaler cannot be liable for money damages because he acted in good faith reliance upon Article 1222, and that he does not have an interest of sufficient immediacy and reality to defend the constitutional validity of Article 1222 or its successors, the trial judge concluded that a declaratory judgment ". . . would be without significance as to any legal controversy between the parties, or as to the present law of Texas," and dismissed Plaintiffs' action on its merits. The trial judge's decision is sharply at variance with the recent (1975) opinion of the Texas Supreme Court, which held that Article 1222 did *not* provide exoneration as a matter of law for a killing which would otherwise be actionable. In *Howsley v. Gilliam,* 517 S.W.2d 531, the Texas Supreme Court held,

> ". . . It is well established that the mere fact that the Legislature adopts a criminal statute does not mean this court must accept it as a standard for

civil liability. . . Art. 1222 establishes the minimum standard of conduct necessary to relieve one from the burden of criminal prosecution . . . It follows that simply because one may be statutorily relieved from criminal prosecution does not mean he will be universally exonerated from civil liability when his conduct falls below the minimum standard applicable to the civil law. This has now been expressly recognized by the Legislature by its enactment of Section 9.06 of the Penal Code, Vernon's Tex. Codes Ann.: 'The fact that conduct is justified under this chapter does not abolish or impair any remedy for the conduct that is available in a civil suit." . . . We hold that in the instant wrongful death action based on negligence, where there was no allegation of self-defense, defense of others, or defense of property, the shield of justifiable homicide provided by Art. 1222 confers no exoneration upon Dr. Gilliam . . . We have not been presented with, and express no opinion on the applicability of, questions concerning battery, use of reasonable force to protect one's property, assumed risk, discovered peril, or other such matters. . ."

But even if Thaler's assertion of good faith reliance upon the prevailing law is held to exonerate him from money damages, the 8th Circuit Court held that a declaratory judgment is still appropriate relief:

"Declaratory and injunctive relief, while similar in some respects, are distinct remedies. One testing the constitutionality of a state statute in a federal court may ask for declaratory relief only. He need not ask for injunctive relief; and if he does not do so, a single judge can hear the case and give declaratory relief if appropriate . . . The defense (of good faith) cannot be permitted to serve as a reason for denying equitable or declaratory relief in appropriate situa-

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> tions . . . A declaratory judgment would not, as the trial court suggests, be totally ineffectual. Such a judgment "* * * has the force and effect of a final judgment or decree and is [reviewable as such] * * *" 28 U.S.C. 2201. The judgment is res adjudicata and the doctrine of collateral estoppel is applicable. The judgment is precedential as to the matters declared by it. . . Most importantly, if the statute is declared unconstitutional, a defense based on a good faith belief of the statute's validity would no longer be available. . ."
>
> *Mattis v. Schnarr,* 502 F.2d 588 (1974)

Mattis also involved a father whose son was killed by police while attempting to escape arrest for burglary and who brought a suit under 42 U.S.C. 1983 for damages and declaratory relief. The parallel could not be more precise. The propriety of a declaratory judgment in this case, as in *Mattis,* rests upon the following identical consequences:

(a) it would have the force and effect of a final judgment and be reviewable as such;

(b) the judgment would be *res adjudicata,* invoking the doctrine of collateral estoppel;

(c) the judgment would be precedential as to the matters declared by it; and

(d) most importantly, if the statute is declared unconstitutional, a defense based on a good faith belief of the statute's validity would no longer be available.

In deciding whether the defendants in the *Mattis* case had a sufficient interest in the outcome of the declaratory judgment action to meet the case or controversy require-

ment of Article III, and whether it was unfair, in a practical sense, to burden them with the defense of that action, the Eighth Circuit Court said,

> "While it is clear that the judicial power extends only to 'actual controversies arising between adverse litigants,' *Muskrat v. U.S.*, 219 U.S. 346, 361 (1911), we do not agree that defendants lack sufficient adverse interest. The defendants have a stake in the outcome because the declaratory relief sought would define their rights and powers as police officers. They have an interest in assuring that the law governing their official conduct is clear so that they may perform their duties in a manner consistent with the Constitution. This interest is not a financial one, but it is an adverse one, nevertheless. * * *
>
> "Once it is seen that defendants Marek and Schnarr are proper parties, and that a case or controversy does indeed exist, the practical question of whether or not it is unfair to name them as defendants becomes irrelevant. That issue has long since been resolved by *Ex Parte Young*, 209 U.S. 123 (1908), which held that a state official who attempts to assert powers conveyed by an unconstitutional enactment 'is stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct.' Id. at 159-160. . ."

It would appear that officer Thaler has as much a stake in defining his rights and powers as a police officer in Texas as officers Marek and Schnarr in Missouri. The quoted remarks of the Eighth Circuit Court would also seem applicable *in toto* to the instant case.

(3) *Kenosha v. Bruno*, 412 U.S. 507 (1973), made clear that the current Supreme Court holds that municipalities are not "persons" within the definitions of 28

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U.S.C. §1983. The decision has been criticized in the literature. Comment, 5 *N.C. Central L.J.* 351 (1974); Comment, 8 *Val. U. L. Rev.* 215 (1974). Mr. Justice Rehnquist's majority opinion in *Bruno* was based on a reading of *Monroe v. Pape,* 365 U.S. 167 (1961) that no relief was available against municipalities since they are never "persons" under § 1983. Although *Monroe* concerned the issue of damages only, Footnote 50 of *Monroe,* 365 U.S. at 191, suggested that the holding might also apply to equitable relief. Justice Rehnquist apparently considered this footnote dictum controlling, as did some lower courts after *Monroe. Wilcher v. Gain,* 311 F. Supp. 754 (N.D. Cal. 1970); *Brown v. Caliente,* 392 F.2d 546 (9th Cir., 1968). Justice Douglas, who wrote the majority opinion in *Monroe,* dissented in *Bruno* because he felt that the Court should *fully* consider the issue and not allow the earlier dictum to be controlling. 412 U.S. at 516.

Roughly half the courts between *Monroe* and *Bruno* limited the former to its facts and allowed some sort of equitable relief against municipalities. *Adams v. City of Park Ridge,* 293 F.2d 585 (7th Cir., 1961); Dailey v. *Lawton,* 425 F.2d 1037 (10th Cir., 1970); *Harkless v. Sweeney Independent School District,* 427 F.2d 319 (5th Cir., 1970); *Garren v. Winston-Salem,* 439 F.2d 140 (N.C., 1971).

The legislative history cited in *Monroe* shows a concern that allowing damages against municipalities would so deplete their treasuries as to retard their functon. Obviously, injunctive and declaratory relief do not suffer from this fault. It would seem that complete removal of municipal liability would eliminate in large part the deterrent effect of §1983 which has had an enormously beneficial effect in the promotion of civil rights in our

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country. To allow damages only against individuals, and not against their municipal employers, would likely discourage potential litigants who would unfavorably consider the smaller chance of recovery.

Since municipalities are typically covered by liability insurance anyway, the concern about depleting their coffers may no longer be as valid.

CONCLUSION

For the reasons given above, a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April, 1976, three copies of the Petition for Writ of Certiorari were served upon R. William Spinn, Attorney for the Respondents, P. O. Box 1118, Brenham, Texas, by mailing them to him at such address through the United States mail, postage prepaid.

KATHRYN V. WOLFER

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APPENDIX A

Charles J. WOLFER and wife, Kathryn Wolfer,

Plaintiffs-Appellants,

v.

Raymond C. THALER and the City of Brenham,

Defendants-Appellees.

No. 75-3077

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

January 7, 1976.

Appeal from the United Staes District Court for thc Western District of Texas.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

DYER, Circuit Judge:

[1] Appellants are husband and wife who brought suit under 42 U.S.C.A. §1983,[1] against defendant police

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. Texas law provides that a death action may be brought on behalf of a child by parents within 3 months of the death or thereafter by the executor or administrator of the deceased, V.A.T.S., art. 4675, and that a cause of action survives the death of a person, V.A.T.S., art. 5525. Under these circumstances, appellants have standing under Section 1983. *Brazier v. Cherry,* 5 Cir. 1961, 293 F.2d 401. *See Mattis v. Schnarr,* 8 Cir. 1974, 502 F.2d 588, 590.

officer Thaler, and the City of Brenham, Thaler's employer. The gravaman of the complaint is that Thaler's fatal shooting of appellants' son while he was attempting to flee from a burglary was an unconstitutional deprivation of their son's life. Appellants seek monetary damages for the loss of their son, a declaratory judgment that the old Texas justifiable homicide statute, V.T.C.A., Penal Code, Art. 1222, under which Thaler acted,[2] is unconstitutional, and an injunction against the enforcement of Art. 1222. The district court dismissed the action against the City of Brenham on the authority of *City of Kenosha v. Bruno,* 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. It later granted defendant Thaler's motion for summary judgment, on the grounds that (1) defendant Thaler's good faith reliance on the constitutionality of Article 1222 precluded an award of monetary damages under Section 1983,[3] and (2) declaratory relief[4] is unavailable because (a) there is no case or controversy between the parties and (b) Article 1222 has been re-

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2. V.T.C.A., Art. 1222 provided in pertinent part:
Homicide is justifiable when inflicted for the purpose of preventing . . . burglary and theft at night, . . . when the killing takes place under the following circumstances:
* * * *
8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

3. The district court relied on *Pierson v. Ray,* 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288. Appellants do not challenge this holding. Cf. Theis, "Good Faith" as a Defense to Suits for Police Deprivation of Individual Rights, 59 Minn. L. R. 991, 1011, 1025 (1975).

4. The district court could not have enjoined enforcement of Article 1222. Such an injunction falls under the hegemony of a three-judge court. 28 U.S.C.A. § 2281.

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placed by V.T.C.A., Penal Code §9.42[5] so that declaratory relief with respect to Article 1222 would be without significance. Appellants challenge the dismissal of the City and the denial of declaratory relief. We affirm.

[2] Although appellants argue the constitutionality of both the old and new Texas justifiable homicide statutes, that issue is not before us. Since we agree that *Kenosha* required dismissal of the action against the City of Brenham, the sole question is the propriety of declaratory relief.

[3] A declaratory judgment may only be issued in the case of an "actual controversy." 28 U.S.C.A. § 2201. That is, under the facts alleged, there must be a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826.

[4] No such controversy exists here. Once Thaler is absolved from liability for damages under Section 1983, his interest in the constitutionality of Article 1222 is

5. The new justifiable homicide statute provides in pertinent part:
A person is justified in using deadly force against another to protect . . . tangible, movable property:
(2) when and to the degree he reasonably believes the deadly force is immediately necessary:
. . . .
(B) to prevent the other who is fleeing immediately after committing burglary . . . from escaping with the property; **and**
(3) he reasonably believes that:
(A) the . . . property cannot be protected or recovered by any other means; or
(B) the use of force other than deadly force to protect or recover . . . property would expose the actor or another to a substantial risk of death or serious bodily injury.

no different than appellants or any other citizen of the state of Texas.

Nor is there any immediacy or reality to the alleged controversy. Article 1222 has been supplanted. A declaratory judgment with respect to its constitutionality would be pointless.

Appellants rely heavily on *Mattis v. Schnarr,* 8 Cir. 1974, 502 F.2d 588. On similar facts save one, the *Mattis* court held that defendant police officers had a sufficient adverse interest because (1) a declaratory judgment would define their rights and powers as police officers and (2) they have an interest in assuring that the law governing their official conduct is clear so that they may perform their duties in a constitutional manner. *Id.* at 595.

The distinguishing fact is fatal to reliance on *Mattis*: the Texas law has been amended. Therefore, neither basis offered by *Mattis* creates the necessary "actual controversy."

Affirmed.

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APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION A-72-CA-165

CHARLES J. WOLFER, ET AL.

v.

RAYMOND C. THALER

O R D E R

Came on this day for consideration by the Court Defendants' Motion for Summary Judgment. Plaintiffs have brought this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201, seeking damages and injunctive and declaratory relief arising from the death of their son resulting from gunshot wounds inflicted by Defendant.

At all times relevant hereto Defendant Thaler was a police officer for the City of Brenham, Texas. On January 22, 1971, he received a call that a burglary was in progress at the Gibson Discount Store in Brenham. Upon arrival at the scene, Defendant stationed himself at the store's back door while another officer entered the front door and arrest one of the burglars. Thereafter, Wolfer ran out the backdoor of the Gibson's store. Defendant yelled at Wolfer to stop and, when he did not, fired one shot from his shotgun at Wolfer, killing him. Wolfer was unarmed.

The parties agree that Defendant's actions were within the scope of the then-existing "justifiable homicide" provision of the Texas Penal Code:

> Homicide is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night. . . , whether the homicide be committed by the party about to be injured or by another in his behalf, when the killing takes place under the following circumstances:
>
> * * *
>
> 8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

TEX. PENAL CODE art. 1222.

Defendant asserts, and Plaintiffs do not deny, that Defendant acted in good faith reliance upon Article 1222, believing his actions to be authorized by a valid, lawful and constitutional statute of the State of Texas. Under these facts Defendant cannot be held liable in money damages under 42 U.S.C. §1983. *Pierson v. Ray,* 386 U.S. 547 (1967).

Plaintiffs, however, also seek a declaratory judgment that Article 1222 authorizes an unconstitutional denial of due process of law "in that it authorized . . . and sanctifies with all the force of law . . . the killing of a human being under essentially arbitrary conditions." Complaint at 4. On the same grounds Plaintiffs seek to enjoin enforcement of Article 1222, although there has been no request for the convening of a three-judge court pursuant to 28 U.S.C. §2281, 2284.

A declaratory judgment could resolve no actual controversy as to the legal rights of the litigants. *See Golden v. Zwickler,* 394 U.S. 103 (1969). As already noted,

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Defendant cannot be held liable for money damages under 42 U.S.C. §1983. Any claim by Plaintiffs for wrongful death is maintainable regardless of the validity of Article 1222. *See Howsley v. Gilliam,* 517 S.W.2d 531 (Tex. 1975). Moreover, Defendant, a Brenham police officer, hardly has an interest "of sufficient immediacy and reality" *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, in defending the constitutional validity of Article 1222 to establish a "case or controversy" between the parties.

Further, Article 1222 is no longer the law in Texas. The new Texas Penal Code, effective January 1, 1974, substantially modifies the "justifiable homicide" provisions of the old Article 1222. The present Texas Penal Code's Section 9.42 authorizes the use of deadly force against another to protect land or tangible, movable property only when the actor reasonably believes deadly force is immediately necessary:

> (2)(B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and
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> (3) he reasonably believes that:
> (A) the land or property cannot be protected or recovered by any other means; or
> (B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

These qualifications on the justification for use of deadly force materially alter the provisions of Article 1222. Thus, any declaratory judgment as to the constitutionality of Article 1222 would be without significance as to any legal

controversy between the parties, or as to the present law of Texas. Likewise, any injunctive relief would only restrain enforcement of a statute which is no longer the law. This Court may not issue an abstract decision involving no actual case or controversy. Plaintiffs' claims for declaratory and injunctive relief must be denied.

There are no material facts in dispute, and Defendant is entitled to judgment as a matter of law. It is accordingly

ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment be, and hereby is, GRANTED; that Plaintiffs take nothing; and that this action be, and hereby is, DISMISSED on the merits.

Entered at Austin, Texas, this 30th day of June, 1975.

JACK ROBERTS
United States District Judge

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IN THE

Supreme Court of the United States

October Term, 1975

NO. 75-1398

CHARLES J. WOLFER and Wife,
KATHRYN WOLFER,
Petitioners

v.

RAYMOND C. THALER and the
CITY OF BRENHAM,
Respondents

Writ of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court of the United States:

STATEMENT OF THE CASE

At all pertinent times made the basis of this lawsuit, Respondent, Raymond C. Thaler, was an employee, to-wit, a police officer, employed by the City of Brenham, Texas, a municipal corporation. On the 22nd day of January, 1971, at approximately 12:10 a.m., the burglar

alarm at the Gilbson's Discount Store on South Day Street in Brenham, Texas, went off. Officer Raymond C. Thaler and another officer of the City of Brenham went to the location of the Gilbson's Discount store. The other officer approached the front door and Officer Raymond C. Thaler went to the back of the store. As he was standing at the back door of the store, a subject later identified as Charles Edward Wolfer, ran out of the back door, wearing a white store apron over his face. Respondent Thaler yelled at him several times to stop, but he kept running from the store. Respondent Thaler fired one shot from a shotgun and the subject fell to the ground.

Upon motion, the trial Judge dismissed the City of Brenham from Petitioners' complaint on the 8th day of April, 1974.

Upon motion, the trial Judge granted Raymond C. Thaler's Motion for Summary Judgment on the 30th day of June, 1975. A copy of the opinion of the trial court is set out in the Appendix, infra.

The United States Court of Appeals for the Fifth Circuit affirmed the opinion of the trial court, which opinion was signed and published in 525 F.2d 977. A copy of the same is set out in the Appendix, infra.

STATEMENT OF COUNTER ISSUES

1. **The Order of the District Court, Dismissing the City of Brenham from Petitioners' Complaint on the 8th Day of April, 1974, Was Proper.**

2. **The Order of the District Court Granting Respondent, Raymond C. Thaler's Motion For Summary Judgment Granted on the 30th Day of June, 1975, Was Proper.**

COUNTER ISSUE 1
(Restated)

1. The Order of the District Court, Dismissing the City of Brenham from Petitioners' Complaint on the 8th Day of April, 1974, Was Proper.

(1) Petitioners' complaint regarded alleged conduct of an officer employed by the City of Brenham, Texas, and jurisdiction was sought over the City of Brenham pursuant to Title 42 U.S.C. Section 1983 and Title 28 U.S.C. Section 1343 (3). Further, injunctive relief was sought under Title 42 U.S.C. Section 1983 and a judgment of declaratory rights of the parties as sought under Title 28 U.S.C. Section 2201.

The City of Brenham is not a person under the various sections referred to in Petitioners' complaint. *City of Kenosha v. Bruno,* 412 U.S. 507 (1973) and numerous other cases sustaining this point.

The Respondent, Raymond C. Thaler, was an employee of the City of Brenham at the time of the alleged wrongdoing and was engaged in a governmental function of the City of Brenham, and the City of Brenham would thus not be liable for the tortuous conduct of its employees. Vernon's Annotated Civil Statutes Art. 6252-19. *Pontarelli v. City of McAllen,* CCA (1971) 465 S.W.2d 804.

COUNTER ISSUE 2
(Restated)

2. The Order of the District Court Granting Respondent, Raymond C. Thaler's Motion For Summary Judgment Granted on the 30th Day of June, 1975, Was Proper.

(1) At all times relevant hereto, Respondent Thaler was a police officer for the City of Brenham, Texas. On January 22, 1971, he received a call that a burglary was in progress at the Gilbson's Discount Store in Brenham, Texas. Upon arrival at the scene, Respondent Thaler stationed himself at the store's back door while another officer entered the front door and arrested one of the burglars. Thereafter, Wolfer ran out of the back door of the Gilbson's Discount Store. Respondent Thaler yelled at Wolfer to stop and when he did not, fired one shot from a shotgun at Wolfer, killing him. Wolfer was unarmed.

All parties agree that the actions of Respondent Raymond C. Thaler were within the scope of the then-existing "justifiable homicide" provision of the Texas Penal Code:

> Homicide is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night . . ., whether the homicide be committed by the party about to be injured or by another in his behalf, when the killing takes place under the following circumstances:
>
> * * *
>
> 8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

TEX. PENAL CODE art. 1222.

All parties agree that Respondent, Raymond C. Thaler, acted in good faith in reliance upon Article 1222, believing his actions to be authorized by a valid, lawful and constitutional statute of the State of Texas. Under these facts, the Respondent cannot be held liable in money

damages under 42 U.S.C. Sec. 1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

Petitioner also sought a declaratory judgment that Article 1222 authorizes an unconstitutional denial of due process of law "in that it authorized . . . and sanctifies with all the force of law . . . the killing of a human being under essentially arbitrary conditions." On the same grounds, Petitioners sought to enjoin enforcement of Article 1222, although there was no request for the convening of a three-judge court pursuant to 28 U.S.C. Sec. 2281, 2284.

A declaratory judgment could resolve no actual controversy as to the legal rights of the litigants. *See Golden v. Zwickler*, 394 U.S. 103 (1969). As already noted, Respondent, Raymond C. Thaler, cannot be held liable for money damages under 42 U.S.C. Sec. 1983. Any claim by Petitioners for wrongful death is maintainable regardless of the validity of Article 1222. *See Howsley v. Gilliam*, 517 S.W.2d 531 (Tex. 1975). Moreover, Respondent, Raymond C. Thaler, a Brenham police officer, hardly has an interest "of sufficient immediacy and reality" *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, in defending the constitutional validity of Article 1222 to establish a "case or controversy" between the parties.

Further, Article 1222 is no longer the law in Texas. The new Texas Penal Code, effective January 1, 1974, substantially modifies the "justifiable homicide" provisions of the old Article 1222. The present Texas Penal Code's Section 9.42 authorizes the use of deadly force against another to protect land or tangible, movable property only when the actor reasonably believes deadly force is immediately necessary:

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(2) (B) to prevent the other who is fleeing immediately after committing burglary, robbery, aggravated robbery, or theft during the nighttime from escaping with the property; and

(3) he reasonably believes that:

(A) the land or property cannot be protected or recovered by any other means; or

(B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

These qualifications on the justification for use of deadly force materially alter the provisions of Article 1222. Thus, any declaratory judgment as to the constitutionality of Article 1222 would be without significance as to any legal controversy between the parties, or as to the present law of Texas. Likewise, any injunctive relief would only restrain enforcement of a statute which is no longer the law. It would be improper for the Court to issue an abstract decision involving no actual case or controversy.

CONCLUSION

For the reasons given above, a Writ of Certiorari should not be granted.

Respectfully submitted,

R. WILLIAM SPINN, *Attorney for*
Raymond C. Thaler and the
City of Brenham, Texas

CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of April, 1976, a copy of the foregoing Brief for Respondents was served upon Kathryn V. Wolfer, Attorney for Petitioners, 2500 Dunstan, Suite 307, Houston, Texas 77005, by mailing a copy of her at such address through the United States mail, postage prepaid.

R. WILLIAM SPINN

APPENDIX A

Charles J. WOLFER and wife, Kathryn Wolfer,

Plaintiffs-Appellants,

v.

Raymond C. Thaler and the City of Brenham,

Defendants-Appellees.

No. 75-3077

Summary Calendar.*

United States Court of Appeals,

Fifth Circuit.

January 7, 1976.

Appeal from the United States District Court for the Western District of Texas.

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

DYER, Circuit Judge:

[1] Appellants are husband and wife who brought suit under 42 U.S.C.A. §1983,[1] against defendant police

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

1. Texas law provides that a death action may be brought on behalf of a child by parents within 3 months of the death or thereafter by the executor or administrator of the deceased, V.A.T.S., art. 4675, and that a cause of action survives the death of a person, V.A.T.S., art. 5525. Under these circumstances, appellants have standing under Section 1983. *Brazier v. Cherry*, 5 Cir. 1961, 293 F.2d 401. *See Mattis v. Schnarr*, 8 Cir. 1974, 502 F.2d 588, 590.

officer Thaler, and the City of Brenham, Thaler's employer. The gravaman of the complaint is that Thaler's fatal shooting of appellants' son while he was attempting to flee from a burglary was an unconstitutional deprivation of their son's life. Appellants seek monetary damages for the loss of their son, a declaratory judgment that the old Texas justifiable homicide statute, V.T.C.A., Penal Code, Art. 1222, under which Thaler acted,[2] is unconstitutional, and an injunction against the enforcement of Art. 1222. The district court dismissed the action against the City of Brenham on the authority of *City of Kenosha v. Bruno*, 1973, 412 U.S. 507, 93 S.Ct. 2222, 37 L.Ed.2d 109. It later granted defendant Thaler's motion for summary judgment, on the grounds that (1) defendant Thaler's good faith reliance on the constitutionality of Article 1222 precluded an award of monetary damages under Section 1983,[3] and (2) declaratory relief[4] is unavailable because (a) there is no case or controversy between the parties and (b) Article 1222 has been re-

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2. V.T.C.A., Art. 1222 provided in pertinent part:
Homicide is justifiable when inflicted for the purpose of preventing . . . burglary and theft at night, . . . when the killing takes place under the following circumstances:
* * * *
8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

3. The district court relied on *Pierson v. Ray*, 1967, 386 U.S. 547, 87 S.Ct. 1213, 18 L.Ed.2d 288. Appellants do not challenge this holding. Cf. Theis, "Good Faith" as a Defense to Suits for Police Deprivation of Individual Rights, 59 Minn. L. R. 991, 1011, 1025 (1975).

4. The district court could not have enjoined enforcement of Article 1222. Such an injunction falls under the hegemony of a three-judge court. 28 U.S.C.A. § 2281.

placed by V.T.C.A., Penal Code §9.42[5] so that declaratory relief with respect to Article 1222 would be without significance. Appellants challenge the dismissal of the City and the denial of declaratory relief. We affirm.

[2] Although appellants argue the constitutionality of both the old and new Texas justifiable homicide statutes, that issue is not before us. Since we agree that *Kenosha* required dismissal of the action against the City of Brenham, the sole question is the propriety of delaratory relief.

[3] A declaratory judgment may only be issued in the case of an "actual controversy." 28 U.S.C.A. §2201. That is, under the facts alleged, there must be a substantial controversy of sufficient immediacy and reality between parties having adverse legal interests. *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 1941, 312 U.S. 270, 273, 61 S.Ct. 510, 85 L.Ed. 826.

[4] No such controversy exists here. Once Thaler is absolved from liability for damages under Section 1983, his interests in the constitutionality of Article 1222 is

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5. The new justifiable homicide statute provides in pertinent part:
A person is justified in using deadly force against another to protect . . . tangible, movable property:
(2) when and to the degree he reasonably believes the deadly force is immediately necessary:
. . . .
(B) to prevent the other who is fleeing immediately after committing burglary . . . from escaping with the property; and
(3) he reasonably believes that:
(A) the . . . property cannot be protected or recovered by any other means; or
(B) the use of force other than deadly force to protect or recover . . . property would expose the actor or another to a substantial risk of death or serious bodily injury.

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no different than appellants or any other citizen of the state of Texas.

Nor is there any immediacy or reality to the alleged controversy. Article 1222 has been supplanted. A declaratory judgment with respect to its constitutionality would be pointless.

Appellants rely heavily on *Mattis v. Schnarr*, 8 Cir. 1974, 502 F.2d 588. On similar facts save one, the *Mattis* court held that defendant police officers had a sufficient adverse interest because (1) a declaratory judgment would define their rights and powers as police officers and (2) they have an interest in assuring that the law governing their official conduct is clear so that they may perform their duties in a constitutional manner. *Id.* at 595.

The distinguishing fact is fatal to reliance on *Mattis:* the Texas law has been amended. Therefore, neither basis offered by *Mattis* creates the necessary "actual controversy."

Affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS

AUSTIN DIVISION

CIVIL ACTION A-72-CA-165

CHARLES J. WOLFER, ET AL.

v.

RAYMOND C. THALER

O R D E R

Came on this day for consideration by the Court Defendants' Motion for Summary Judgment. Plaintiffs have brought this action pursuant to 42 U.S.C. §1983 and 28 U.S.C. §2201, seeking damages and injunctive and declaratory relief arising from the death of their son resulting from gunshot wounds inflicted by Defendant.

At all times relevant hereto Defendant Thaler was a police officer for the City of Brenham, Texas. On January 22, 1971, he received a call that a burglary was in progress at the Gibson Discount Store in Brenham. Upon arrival at the scene, Defendant stationed himself at the store's back door while another officer entered the front door and arrest one of the burglars. Thereafter, Wolfer ran out the backdoor of the Gibson's store. Defendant yelled at Wolfer to stop and, when he did not, fired one shot from his shotgun at Wolfer, killing him. Wolfer was unarmed.

The parties agree that Defendant's actions were within the scope of the then-existing "justifiable homicide" provision of the Texas Penal Code:

> Homicide is justifiable when inflicted for the purpose of preventing murder, rape, robbery, maiming, disfiguring, castration, arson, burglary and theft at night. . . , whether the homicide be committed by the party about to be injured or by another in his behalf, when the killing takes place under the following circumstances:
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> 8. In cases of burglary and theft by night, the homicide is justifiable at any time while the offender is in the building or at the place where the theft is committed, or is within reach of gunshot from such place or building.

TEX. PENAL CODE art. 1222.

Defendant asserts, and Plaintiffs do not deny, that Defendant acted in good faith reliance upon Article 1222, believing his actions to be authorized by a valid, lawful and constitutional statute of the State of Texas. Under these facts Defendant cannot be held liable in money damages under 42 U.S.C. §1983. *Pierson v. Ray*, 386 U.S. 547 (1967).

Plaintiffs, however, also seek a declaratory judgment that Article 1222 authorizes an unconstitutional denial of due process of law "in that it authorized . . . and sanctifies with all the force of law . . . the killing of a human being under essentially arbitrary conditions." Complaint at 4. On the same grounds Plaintiffs seek to enjoin enforcement of Article 1222, although there has been no request for the convening of a three-judge court pursuant to 28 U.S.C. §2281, 2284.

A declaratory judgment could resolve no actual controversy as to the legal rights of the litigants. *See Golden*

v. Zwickler, 394 U.S. 103 (1969). As already noted, Defendant cannot be held liable for money damages under 42 U.S.C. §1983. Any claim by Plaintiffs for wrongful death is maintainable regardless of the validity of Article 1222. *See Howsley v. Gilliam,* 517 S.W.2d 531 (Tex. 1975). Moreover, Defendant, a Brenham police officer, hardly has an interest "of sufficient immediacy and reality" *Maryland Casualty Co. v. Pacific Coal & Oil Co.,* 312 U.S. 270, 273, in defending the constitutional validity of Article 1222 to establish a "case or controversy" between the parties.

Further, Article 1222 is no longer the law in Texas. The new Texas Penal Code, effective January 1, 1974, substantially modifies the "justifiable homicide" provisions of the old Article 1222. The present Texas Penal Code's Section 9.42 authorizes the use of deadly force against another to protect land or tangible, movable property only when the actor reasonably believes deadly force is immediately necessary:

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> (B) the use of force other than deadly force to protect or recover the land or property would expose the actor or another to a substantial risk of death or serious bodily injury.

These qualifications on the justification for use of deadly force materially alter the provisions of Article 1222. Thus, any declaratory judgment as to the constitutionality of

Article 1222 would be without significance as to any legal controversy between the parties, or as to the present law of Texas. Likewise, any injunctive relief would only restrain enforcement of a statute which is no longer the law. This Court may not issue an abstract decision involving no actual case or controversy. Plaintiff's claims for declaratory and injunctive relief must be denied.

There are no material facts in dispute, and Defendant is entitled to judgment as a matter of law. It is accordingly.

ORDERED, ADJUDGED and DECREED that Defendant's Motion for Summary Judgment be, and hereby is, GRANTED; that Plaintiffs take nothing; and that this action be, and hereby is, DISMISSED on the merits.

Entered at Austin, Texas, this 30th day of June, 1975.

JACK ROBERTS
United States District Judge